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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 380

RONALD L. TODD, ET AL.,

Petitioners,

vs.

JOINT APPRENTICESHIP COMMITTEE, ETC., LOCAL UNION NO. 1, ETC., BETHLEHEM STEEL COMPANY, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF BETHLEHEM STEEL COMPANY IN OPPOSITION.

PAUL R. CONAGHAN,
208 South LaSalle Street,
Chicago, Illinois 60604,
Attorney for Bethlehem Steel Company, Respondent.

STEVENSON, CONAGHAN, HACKBERT,
ROOKS and PITTS,
Of Counsel.

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OPINIONS BELOW.

The opinions below are reported in 223 F. Supp. 12 and 332 F. 2d 243.

OBJECTIONS TO JURISDICTION.

1. The issues are moot. Bethlehem has performed its subcontract with respect to Master Contract No. GS-5PC-1178 to construct a United States court house and federal building in Chicago. Bethlehem's liability was predicated

solely upon that contract. Performance was concluded on October 23, 1963. Plaintiffs have no employment rights against Bethlehem as directed in the mandatory injunction of the District Court.

2. The controversy has become academic because of change in circumstances. Bethlehem has completed its subcontract. The steel framework of the new federal court house building has been erected. The District Court found no discrimination by Bethlehem. There is no real controversy between the plaintiffs and Bethlehem.

3. The evidence and findings of fact show plaintiffs never had a cause of action against Bethlehem. The complaint should be dismissed for want of equity.

4. The failure of plaintiffs to exhaust administrative remedies bars a suit for injunction in a federal district court. The complaint should be dismissed.

QUESTIONS PRESENTED.

1. Whether Negro plaintiffs, who alleged violation of race discrimination provisions in a subcontract by Bethlehem to produce, fabricate and erect the steel framework on a new United States court house and federal office building in Chicago, have employment rights to a mandatory injunction against Bethlehem for alleged violation of the race discrimination provisions in the subcontract, where the work required by the subcontract has been concluded on October 23, 1963, and where the District Court found as a fact that there was no discrimination by Bethlehem against plaintiffs on account of race, creed or color.

2. Whether plaintiffs, who were not indentured as apprentice iron workers and for that reason were not employed by Bethlehem, are entitled to a mandatory injunction directing that plaintiffs be employed by Bethlehem as

apprentice iron workers when properly indentured, where the District Court found as a fact that there had been no discrimination by Bethlehem against plaintiffs.

3. Whether this Court should reverse or vacate the decree against Bethlehem in the District Court and direct the District Court to dismiss the complaint against Bethlehem because the issues are moot.

4. Whether the judgment of the Court of Appeals is in conflict with decisions of this Court.

5. Whether the complaint and the evidence present a true class action.

STATEMENT OF THE CASE.

A.

The Complaint.

The complaint filed in the United States District Court on September 26, 1963, in substance alleged:

1. On or about October 26, 1962, Paschen Contractors, Inc., a Delaware Corporation, and Peter Kiewit Son's Company, a Nebraska corporation (hereinafter referred to as contractors) entered into Contract No. GS-5PC-1178 to construct a United States court house and federal office building in Chicago. The complaint then set forth the anti-discrimination provisions of the contract.
2. Provisions of the iron workers apprenticeship program.
3. That plaintiffffs were native born citizens and Negroes and are physically able to perform work as apprentices.
4. That plaintiffs sought employment as apprentice iron workers by Bethlehem Steel Company, the sub-

contractor employed by the contractors to produce, fabricate and erect the steel framework of the building. That "Notwithstanding the application and qualification of plaintiffs and each of the persons similarly situated, Bethlehem Steel Company has failed and refused to employ these persons or any of them to work on the project covered by Contract No. GS-5PC-1178 solely because of their race and color."

5. That Contract No. GS-5PC-1178 was entered into for the benefit of the plaintiffs and persons similarly situated.
6. That "none of the defendants has secured enforcement of the rights of the plaintiffs or the class they represent under the terms of Contract No. GS-5PC-1178."
7. Provisions of Executive Order No. 10925 issued March 6, 1961.

Plaintiffs in their complaint prayed for relief as follows:

"WHEREFORE, the plaintiffs respectfully pray this Court to enjoin the defendants and each of them from proceeding with the performance of Contract No. GS-5PC-1178 unless and until plaintiffs and each of them is duly and regularly employed as an iron workers apprentice or in the alternative that this Court enjoin and restrain the defendants and each of them from making or receiving any payments on account of such contract unless and until plaintiffs and each of them is duly and regularly employed as an iron workers apprentice."

A Copy of the complaint is set forth in the appendix to this brief.

The District Court did not enjoin Bethlehem or contractors "from proceeding with the performance of Con-

tract No. GS-5PC-1178" and did not enjoin Bethlehem or contractors "from making or receiving any payments on account of such contract", as prayed for in the complaint. No amended complaint was filed by plaintiffs seeking alternate remedies. The District Court did make findings of fact, conclusions of law and issued a temporary injunction. Reference to this action by the District Court will be made later in this statement of the case.

B.

Issues Presented by the Complaint.

On September 27, 1963, Mr. Ming, attorney for the plaintiffs, in explaining to the Court the issues presented by the complaint, in part stated:

> "I think the Court will recognize that construction work being what it is, i.e., performance of a contract by which the work having been done the contract terminates. That unless we are provided with equitable relief and prompt equitable relief the rights of these plaintiffs which are the rights under the contract to be hired and to be trained will be dissipated upon performance of the contract." (Tr. 11.)

The Court inquired:

> "How close is the contract to being performed?"

Mr. Ming:

> "I could tell the Court on the basis of investigation not completed until after the complaint had been drawn that we seem to be within less than thirty days of the completion of this craft aspect of the performance." (Tr. 12.)

Mr. Ming:

> "So that further in aid of our application for equitable relief we point out to the Court what we are really seeking to do is to invoke the Courts of the United

States to enforce the contract, the terms of which, in turn, specifically contain the statement of policy of the United States. . . ." (Tr. 13.)

Mr. Ming:

"They are citizens of the United States. They seek to assert rights provided for them in a contract between the United States and private persons and we ask the Court, and we have suggested in our prayer for relief that the Court either restrain continued performance of the contract until the rights of the plaintiffs are provided, require that they be provided and restrain performance until they are provided or that the Court require the parties not to pay or accept money in connection with performance of the contract." (Tr. 14, 15.)

On September 27, 1963, during a preliminary discussion of the issues before the District Court, the Court was advised by Bethlehem that there was only about two weeks to one month more of work, that Bethlehem was cutting down their operations and that Bethlehem was having their "topping" ceremonies on September 27. The Court remarked "The matter is practically concluded and I think this is an emergency and should be treated as such." (Tr. 24, 25.)

On October 2, 1963, the District Court was advised by Bethlehem that the subcontract of Bethlehem provides that all work shall be completed by October 18, 1963, and that Bethlehem will be able to complete all of the work on or before that date and that when Bethlehem finishes its work the Union will have finished its work on the building. Bethlehem further advised that there were only 68 journeymen structural iron workers employed in the erection work (as contrasted with 128 in June, 1963) and that this number will dwindle almost every day between now and October 18. (Tr. 66, 67.)

On October 11, 1963, Bethlehem advised the Court (Tr. 849, 850) as follows:

> "The uncontradicted evidence in the record is that Bethlehem is not employing men on this project. There are only two apprenticed iron workers on the job at the present time. There are only 64 journeymen iron workers. Three of the four huge derricks have been dismantled, and lowered to the ground. There is one huge derrick there today, but it will be lowered to the ground either this afternoon or Monday of next week.
>
> "So the question is really moot, so far as the defendant Bethlehem is concerned. We are just not employing anyone to complete the structural steel work on the new building, because Bethlehem plans to complete all of its work before the contract termination date, which is, October 18, or Friday of next week. Then it is contemplated that there will be no employee of Bethlehem working on the project, except perhaps for one or two clean up men, as they call it in the trade."

(On October 15, 1963, erection of the steel superstructure of the court house was delayed for several days because of an inquest by the coroner of Cook County of a journeyman structural iron worker, employed by Bethlehem, who accidentally fell to his death from the 30th floor of the building).

On October 22, 1963, Bethlehem advised the District Court that all work of Bethlehem on the site in question would be concluded the following day and that Bethlehem intended to recite that fact in its motion to amend the findings of fact and in its motion for a new trial. The Court replied: "Very well, the record may so show." (Tr. 9.)

On October 25, 1963, in support of its motion to amend findings of fact, for a new trial and to dimiss Bethlehem as a party defendant, Bethlehem filed the affidavit of C. W. Pitchford, executed October 24, 1963. Mr. Pitchford is employed as Manager of Erection, Western District, Beth-

lehem Steel Company, and supervised the erection of steel at the new federal court house building in Chicago.

The affidavit stated that all of the work of Bethlehem Steel Company called for in its subcontract with respect to Contract No. GS-5PC-1178 was completed on Wednesday, October 23, 1963, that no journeymen iron workers or apprentice iron workers are employed on said building site by Bethlehem and that Bethlehem had no employees working on said building site.

The affidavit further stated that Bethlehem Steel Company had no other construction job or steel erection job in the City of Chicago, that the plant of Bethlehem located at 8301 South Stewart Avenue is a steel fabricating plant, that in the process of fabricating steel it does not employ any journeymen iron workers or any apprentice iron workers, that the exclusive collective bargaining agent for production workers at the Stewart Avenue plant of Bethlehem is United Steel Workers of America.

The affidavit further stated that the only other plant of Bethlehem Steel Company located in the Chicago area is the Clearing warehouse located in the Clearing District, Chicago, Illinois, that wire rope, reinforcing bars and other materials of steel are stored in said warehouse, that no journeymen iron workers or apprentice iron workers are employed in said warehouse, that the sole collective bargaining agent for the employees working in the Clearing warehouse is United Steel Workers of America.

No counter-affidavit was filed.

As of this writing, September 4, 1964, Bethlehem has no erection contract in Chicago requiring the employment of journeyman iron workers or iron worker apprentices.

The Court of Appeals for the 7th Circuit in its opinion, 332 F. 2d 243, 246, stated:

"On October 25, 1963, Bethlehem filed affidavits with the trial court that all work in fulfillment of its subcontract on the construction site was completed on October 23, 1963. No one disputed that such was the fact.

"On November 8, 1963, the trial court filed its comprehensive findings of fact, conclusions of law and draft of preliminary injunction and adopted them as its own and ordered them entered *nunc pro tunc* as of October 16, 1963.

"In sum, the findings recited the factual history of the case; that there had been no discrimination against plaintiffs by Contractor or Bethlehem; . . ."

The labor agreement between Bethlehem and the International Association of Iron Workers required that Bethlehem obtain all of its journeymen iron workers in the Chicago area through Chicago Local No. 1 (Tr. 752, 753) and that all iron worker apprentices be indentured as apprentices and be obtained through the Joint Committee.

C.

Plaintiffs' Exhibits in Evidence.

Plaintiffs' Exhibit 18 in evidence stated:

BETHLEHEM STEEL COMPANY.
Chicago 20, Ill.

June 28, 1963.

Chicago Structural Iron Workers,
Joint Apprenticeship Committee,
2405 W. North Avenue,
Chicago 47, Illinois.

GENTLEMEN:

On Monday, June 24, Superintendant Perkins on the GSA Building, Chicago, Illinois, interviewed Messrs. Michael Corcoran, Ronald Todd, and James Hill, Jr., applicants for work as apprentices.

We are in a position to give two of these applicants immediate employment on the GSA Building if you can have them indentured as apprentices in the Apprenticeship Training Program of the Joint Apprenticeship Committee of the Associated Steel Erectors of Chicago, Illinois and the International Association of Bridge, Structural and Ornamental Ironworkers, Local Union No. 1.

We request your fullest cooperation in this matter.

Very truly yours,

BETHLEHEM STEEL COMPANY,

.....

C. W. PITCHFORD,
Manager of Erection Western District.

CWP/as
cc: PASCHEN CONTRACTORS, INC.,
221 S. Bearborn Street,
Chicago 4, Illinois.
MR. DOMINIC TESAURO,
General Services Admin.,
219 S. Clark St.,
Chicago 4, Illinois.
MR. G. P. ADAIR.

Plaintiffs' Exhibit 21 in evidence stated:

JOINT APPRENTICESHIP COMMITTEE
OF THE
ASSOCIATED STEEL ERECTORS OF CHICAGO
AND
INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS
LOCAL UNION NO. 1.

July 2, 1963

Mr. C. W. Pitchford,
Manager of Erection Western District,
Bethlehem Steel Company,
8301 South Stewart Avenue,
Chicago 20, Illinois.

DEAR MR. PITCHFORD:

In reply to your letter of June 28, 1963, regarding the employment of apprentices on the GSA Building in Chicago.

The applicants you mention in your letter have filed their applications with the Committee and are now being processed. However, we do have many qualified applicants on file that have been waiting a great length of time to be called to start an apprenticeship in this craft.

May we suggest to you that if your Superintendent requires additional apprentices, he contact the writer and we will be glad to furnish them from either indentured apprentices or our waiting group.

Sincerely yours,

EDMUND D. FLOOD,
Edmund D. Flood,
Co-Ordinator.

Plaintiffs' Exhibit 24 in evidence in part stated:

BETHLEHEM STEEL COMPANY.
(Incorporated)

Chicago 20, Ill.

July 12, 1963

Chicago Structural Iron Workers,
Joint Apprenticeship Committee,
2405 W. North Avenue,
Chicago 47, Illinois.

GENTLEMEN:

On Monday, June 24, Superintendent Perkins on the GSA Building, Chicago, Illinois, interviewed Messrs. Michael Corcoran, Ronald Todd, and James Hill, Jr., applicants for work as Structural Iron Worker Apprentices.

Bethlehem Steel Co. requests your immediate certification of two of these applicants as indentured Structural Iron Worker Apprentices. We further request that following such certification, they be referred to us for employment at the GSA Building, Chicago, Illinois.

Very truly yours,

BETHLEHEM STEEL COMPANY.

.....

C. W. PITCHFORD,
Manager of Erection, Western District.

CWP/as
CC: PASCHEN CONTRACTORS, INC.,
221 S. Dearborn Street,
Chicago 4, Illinois.

MR. DOMINIC TESAURO,
General Services Administration,
219 South Clark Street,
Chicago 4, Illinois.

Plaintiffs' Exhibit 24 in evidence in part stated:

BETHLEHEM STEEL COMPANY.
(Incorporated)
Chicago 20, Ill.

July 12, 1963

Mr. Dominic Tesauro,
GSA Administrator,
219 S. Clark Street,
Chicago 4, Illinois.

DEAR MR. TESAURO:

Attached is a copy of a letter which I mailed to the Chicago Structural Ironworkers Joint Apprenticeship Committee.

This will confirm our statement to Mr. Flood which was made in the meeting held in your office on July 10, 1963 that Bethlehem Steel Co. will immediately hire two of these applicants on the GSA Building in Chicago when they have been certified as indentured Structural Ironworker Apprentices.

Very truly yours,

BETHLEHEM STEEL COMPANY.
C. W. Pitchford,
Manager of Erection, Western District.

CWP/as
Enc.
CC: PASCHEN CONTRACTORS, INC.,
221 S. Dearborn Street,
Chicago 4, Illinois.

Plaintiffs' Exhibit 25 in evidence stated:

JOINT APPRENTICESHIP COMMITTEE
OF THE
ASSOCIATED STEEL ERECTORS OF CHICAGO
AND
INTERNATIONAL ASSOCIATION OF BRIDGE, STRUCTURAL AND ORNAMENTAL IRONWORKERS
LOCAL UNION No. 1.

(Rubber Stamp)
(Dominic A. Tesauro)
(Regional Administrator)

July 15, 1963

Mr. C. W. Pitchford,
Manager of Erection, Western District,
Bethlehem Steel Company,
8301 South Stewart Avenue,
Chicago 20, Illinois.

DEAR MR. PITCHFORD:

Re: your letter of July 12, 1963.

Your request for immediate assignment of two of the three applicants for apprenticeship listed in your letter, does not follow the normal practices of securing apprentices thru our Committee. May I refer you to my letter of July 2, 1963, in which I suggested that in the event your Superintendent required additional apprentices we will be glad to furnish them from either indentured apprentices or from our waiting groups.

Sincerely yours,

Edmund D. Flood,
Co-Ordinator.

Plaintiffs' Exhibit 26, a letter from the attorney for GSA in Chicago, stated:

FAIR EMPLOYMENT OFFICER.—BRF
Washington, D. C.

July 19, 1963

Deputy Contracts Compliance Officer—5L
5CSL

Court house and Federal Office Building, Chicago, Ill., Local Union No. 1, International Association of Bridge, Structural and Ornamental Ironworkers.

Bethlehem Steel Company is the subcontractor for the structural steel work on the subject project. Bethlehem has a union contract with the International Association of Bridge, Structural and Ornamental Ironworkers, but does not have a contract with Local Union No. 1 which is the Structural Ironworkers' Union in Chicago. However, we are informed by Bethlehem that under its contract with the International, it is required to use union labor from the local union in whatever geographic area a job is in progress, which means Local Union No. 1 in Chicago.

The attached summary with exhibits referred to therein covers the action we have taken in endeavoring to have negro apprentices employed by Bethlehem on the F. O. B. project. We concentrated on employment of apprentices because after much effort it was found that there were no qualified negro journeymen in the Chicago area who were interested in this work.

It will be noted that Bethlehem Steel is perfectly willing to employ the apprentices, and has requested the Joint Apprenticeship Committee to approve certain applications from negroes in order that this can be done. The reply dated July 15, 1963, from the Apprenticeship Committee, refusing the request of Bethlehem Steel, is consistent with the attitude of the Committee and of the Local Union No. 1, which we have found prevalent from the inception of our efforts to have negroes hired on the F. O. B. job.

Inasmuch as this is now a matter of failure on the part of the union to cooperate and we have exhausted all means of persuasion and negotiation at our command, it is felt that this matter should now be reported to the President's Committee for such action as may be appropriate.

HUGH H. BRISTER.

cc: HHBrister—5L
DATesauro—5A
Official File—5CSL
HHBrister/fml

A reply from the special counsel of the Fair Employment Practices Committee, plaintiffs' Exhibit 27 in evidence, dated September 23, 1963, was addressed to Mr. Tesauro, GSA Administrator in Chicago, and in part stated:

> "Under the circumstances, action against Bethlehem would not appear appropriate at this time. I would also suggest deferring any meeting of ironwork contractors on the matter of apprenticeship until the President's Committee acts on the proposed Standards for Determining Contractor Compliance."

D.

Findings of Fact and Conclusions of Law.

On October 16, 1963, the District Court orally made findings of fact, conclusions of law and entered its decree. The Court then instructed the attorney for the plaintiffs to formalize these findings, conclusions of law and the decree.

On November 8, 1963, the District Court entered *nunc pro tunc* as of October 16, 1963 its findings of fact, conclusions of law and preliminary injunction.

The findings of fact dated November 8, 1963, and entered *nunc pro tunc* as of October 16, 1963, in part state:

> "24. On or about June 24, 1963, the plaintiffs were

examined by a representative of Bethlehem and found to be qualified to be hired as apprentice iron workers.

"25. On the same day each of the plaintiffs executed an application for indenture as an apprentice iron worker and each application together with the applicant's birth certificate and references was duly filed with the Joint Committee.

"26. On or about June 28, 1963, Bethlehem stated that it was in a position to give two of the plaintiffs immediate employment on the United States Court House and office building in Chicago if they were indentured by the Joint Committee and requested the Joint Committee to indenture two of the plaintiffs.

"27. None of the plaintiffs has been so indentured or submitted to Bethlehem for employment, or even examined by the Joint Committee.

• • • • •

"49. There has been no discrimination by Bethlehem against the plaintiffs or members of the class on account of their race."

The conclusions of law attached to the findings of fact dated November 8, 1963, and entered *nunc pro tunc* as of October 16, 1963, in part state:

"15. Plaintiffs are entitled to a preliminary injunction requiring the defendant Bethlehem to accept for employment as apprenticeship Iron Workers when they have been properly certified by the Union and Joint Committee, the plaintiffs, Ronald L. Todd and James Hill."

The decree of preliminary injunction dated November 8, 1963, and entered *nunc pro tunc* as of October 16, 1963, in part provides:

"3. That the defendant, Bethlehem Steel Company, employ as apprentice iron workers the said plaintiffs, Ronald L. Todd and James Hill, upon their certification as indentured apprentice iron workers and admission to the Union as apprentice iron workers."

The opinion of the District Court in the case at bar was rendered on October 16, 1963, *Todd, et al.* v. *Joint Apprenticeship Committee, etc., et al.*, 223 F. Supp. 12. The Court in part stated:

> "Bethlehem did, however, express a willingness to hire Todd and Hill as apprentice iron workers subject to their being properly indentured and presented by the Union. This fact was made known by Bethlehem to the Union and to the Joint Committee. All three plaintiffs did, also during the latter part of June, 1963, fill out apprenticeship training applications with the Joint Committee. None of the three were or have been indentured and/or submitted to Bethlehem for employment." (p. 15.)
>
> • • • • •
>
> "Needless to say he [Tesauro, GSA] could not require them, or more specifically in this instance Bethlehem Steel, to hire non-union help. Such a suggestion would require Bethlehem to breach their collective bargaining contract with the Union." (p. 21.)
>
> • • • • •
>
> "It is equally clear on the basis of the evidence and the law of the case that the defendant Bethlehem has not been guilty of any act or acts of discriminatory conduct against either the named plaintiffs or for that matter any un-named members of the plaintiffs' class. However, for the purpose of and only for the purpose of rendering a complete and total decree I cannot dismiss but must retain jurisdiction over Bethlehem Steel." (p. 23.)
>
> • • • • •
>
> "It is hereby further ordered, adjudged and decreed that the defendant Bethlehem Steel Company employ as Apprentice Iron Workers the said Todd and Hill upon their certification and admission as aforesaid." (p. 23.)

On November 8, 1963, the District Court entered an order stating that

> "The motions of defendant Bethlehem Steel Company to have the Court receive in evidence additional affidavits, to amend and alter the Court's findings of fact and conclusions of law and to dismiss Bethlehem Steel Company are each and all denied."

This order was not entered *nunc pro tunc.*

The motion for judgment for defendant Bethlehem at the close of all the evidence in part stated: "The issues are moot with respect to Bethlehem Steel Company."

Defendant Bethlehem filed its separate notice of appeal to the United States Court of Appeals for the Seventh Circuit. Before briefs on the merits were filed, defendant Bethlehem filed with the Court of Appeals its motion to dismiss because of mootness. The Court of Appeals granted the motion, vacated the judgment and decree of the District Court and remanded the case to that Court with directions to dismiss the complaint as to all defendants as moot.

The Court of Appeals stated, 332 F. 2d 243, 246, 7:

> "Our study of the record convinces us that plaintiffs, by this action, sought to enjoin defendants from proceeding with the performance of Contract No. GS-5PC-1178 unless and until they were regularly employed as iron worker apprentices by Bethlehem on this construction site; or, in the alternative, restraining further payments to or by Contractor and Bethlehem until such employment was granted.
>
> "Bethlehem completed all work on its subcontract on October 23, 1963. At the time the preliminary injunction was entered on November 8, 1963, even though *nunc pro tunc* as of October 16, 1963, the matter in controversy had become moot. Bethlehem had no other steel erection activities in the Chicago area.
>
> • • • • •
>
> "In the instant case, we have before us merely a temporary injunction applicable only to the specific construction project to which it is addressed.
>
> • • • • •

"We follow the established practice of the Supreme Court that when an issue or controversy becomes moot prior to or during an appeal that all prior orders should be vacated and the cause remanded with instructions to dismiss. *Brotherhood of Railroad Trainmen* v. *Chicago & I. M. R. Co.*, 375 U. S. 18, 84 S. Ct. 61, 11 L. Ed. 2d 39 (1963)[2]; *Davis* v. *Soja*, 374 U. S. 495, 83 S. Ct. 1863, 10 L. Ed. 2d 1043 (1963).[3]

• • • • •

"2. Reported below: 315 F. 2d 171 (7 Cir.).
"3. Reported below: 303 F. 2d 601 (7 Cir.)."

ARGUMENT.

The judgment of the Court of Appeals is correct. The petition should be denied.

The Court of Appeals in its opinion stated, 332 F. 2d 243, 247:

> "The subject matter of the litigation is no longer an actual controversy. The time for determination of the questions involved in this case has passed. No relief within the scope of the complaint could now be granted."

The issues formed by the complaint are moot. In *United States* v. *Munsingwear,* 340 U. S. 36, 39, this Court stated:

> "The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss."[2]

Footnote 2 contains a long list of cases wherein the Court has vacated the judgment below and remanded with a direction to dismiss because the cases were moot.

In accord are *Brotherhood of Railroad Trainmen* v. *Chicago & I. M. R. Co.,* 84 S. Ct. 61 and *Davis* v. *Soja,* 83 S. Ct. 1863.

The attorney for plaintiffs admitted, in explaining the issues to the District Court, that when the work called for in the contract has been performed "the contract terminates" (Tr. 11); that the "rights of these plaintiffs which are rights under the contract to be hired and to be trained will be dissipated upon performance of the contract." (Tr. 11.) The trial court knew on the day after the complaint

was filed that there was less than 30 days for the completion of the contract. (Tr. 12.)

The attorney for plaintiffs admitted also that "what we are really seeking to do is to invoke the courts of the United States to enforce the contract. . . ." (Tr. 13.)

Plaintiffs clearly predicated liability of Bethlehem solely on the provisions of the contract. The undisputed evidence shows that the contract was completed on October 23, 1963; that after that date no journeyman iron worker or apprenticed iron worker was employed on said building site by Bethlehem and that Bethlehem had no other steel erection job in the City of Chicago for the employment of apprenticed iron workers.

Plaintiffs urge that the petition should be granted because the decision of the Court of Appeals is in conflict with *Carpenters Union* v. *Labor Board,* 341 U. S. 707. In that case the trial examiner, the Labor Board, the Court of Appeals for the Sixth Circuit and this Court found that there was a *continuing violation* of the Labor Management Relations Act of 1947 which should be declared illegal by a cease and desist order. The Court of Appeals in that case, 181 F. 2d 126, 131, stated:

> "Inasmuch as the strike was a continuing one, the Labor Management Relations Act of 1947 is being given no retroactive effect when held applicable to the case at bar.
>
> * * * * *
>
> "The Labor Board based its finding that respondents were violating section 8(b)(4)(A), not upon their actions before the effective date of the Taft-Hartley Act, but in their keeping the strike order in effect after that amendatory Act of Congress became operative. As has been indicated in the foregoing discussion, we think this interpretation was correct."

This Court in its opinion in *Carpenters Union* v. *Labor Board*, 341 U. S. 707, 714, quoted with approval the Labor Board's decision which concluded:

> "'Nor is it material . . . that the labor dispute had its origin before the effective date of the amended Act, for we are convinced that it was continued and prolonged after the effective date by the very same factors which originally created it and for the same original objective which, as found above, Section 8(b)(4)(A) declares unlawful. Thus, at material times both before and after the effective date of the amendments . . . (2) the Respondents' [here petitioners] strike order, which admittedly was never rescinded, was outstanding and effectively prevented the carpenters from officially working on the job as long as Watson's men were also working; . . .' 80 N. L. R. B. at 537-538."

The *Carpenters Union* case is not in conflict with the decision of the Court of Appeals in the case at bar because there was no *continuing discrimination* against plaintiffs by Bethlehem. The District Court found as a fact that there was no discrimination by Bethlehem in the first place. Finding of Fact No. 49 stated:

> "49. There has been no discrimination by Bethlehem against the plaintiffs or members of the class on account of their race."

The opinion of the District Court, 223 F. Supp. 12, stated:

> "Needless to say he [Tesauro, GSA] could not require them, or more specifically in this instance Bethlehem Steel, to hire non-union help. Such a suggestion would require Bethlehem to breach their collective bargaining contract with the Union." (p. 21)
>
> * * * * *
>
> "It is equally clear on the basis of the evidence and the law of the case that the defendant Bethlehem has not been guilty of any act or acts of discriminatory

> conduct against either the named plaintiffs or for that matter any un-named members of the plaintiffs' class. However, for the purpose of and only for the purpose of rendering a complete and total decree I cannot dismiss but must retain jurisdiction over Bethlehem Steel." (p. 23)

It is clear that the issues against Bethlehem as limited by the complaint are moot. There is no *continuing* discrimination by Bethlehem. There never was *any* discrimination.

Plaintiffs also claim that the judgment of the Court of Appeals in the case at bar is in conflict with *Federal Trade Commission* v. *Goodyear Tire & Rubber Company,* 304 U. S. 257 (May 16, 1938). In that case this Court held that the amendment of June 16, 1936 to Section 2 of the Clayton Act permitting price discriminations based upon quantities sold was not intended to affect orders of the Federal Trade Commission issued before the effective date of the amendment. The Court further held that abandonment of a price arrangement found illegal and ordered discontinued by the Federal Trade Commission does not deprive the respondent of the right to have the legality of the practice and validity of the order determined on review by the Court of Appeals. Thus the controversy does not become moot.

The argument that the *Goodyear* case is in conflict with the decision of the Court of Appeals in the case at bar loses its force when, as this Court noted, *Trade Commission* v. *Goodyear Company,* 304 U. S. 257, 259:

> "The provisions of the Act of June 19, 1936, show clearly that the orders of the Commission entered before its passage are to remain in effect. Section 2 of that Act provides that nothing therein contained shall 'affect rights of action arising, or litigation pending, or orders of the Federal Trade Commission issued

> and in effect or pending on review, based on section 2 of said Act of October 15, 1914, prior to the effective date of this amendatory Act.' "

The Federal Trade Commission, like the Labor Board, is authorized by statute to issue cease and desist orders. Discontinuance of the illegal practice by Goodyear did not render the controversy moot. The order of the Federal Trade Commission directing Goodyear to cease and desist from the particular discriminations described in the order is a *continuing* order contemplated by the statute. The Commission should not be required to try the case *de novo* in the event that the particular discriminations were resumed at some future date.

The *Goodyear* case is not in conflict with the decision of the Court of Appeals in the case at bar. As heretofore observed, there was no original discrimination by Bethlehem against plaintiffs on account of their race. There could be no *continuing* discrimination.

The question presented by the petition is not important. The decision of the Court of Appeals in the case at bar turns upon the special facts and limited issues presented by the complaint and will affect few others than the litigants. There never was any employment relation between the plaintiffs and Bethlehem. That lack of employment relation was not the result of discrimination by Bethlehem.

The complaint did not allege and the evidence did not prove a true class action. *Clark* v. *Thompson*, 204 F. Supp. 30, 206 F. Supp. 539, 313 F. 2d 637, cert. denied 84 S. Ct. 440; *Brown* v. *Board of Trustees of LaGrange*, 187 F. 2d 20.

The evidence in this case and the findings of fact show clearly that plaintiffs never had a cause of action against Bethlehem. The complaint should be dismissed for want of equity. *Brown* v. *Board of Trustees of LaGrange*, 187 F. 2d 20, 25.

The complaint should be dismissed also because plaintiffs failed to exhaust their administrative remedies. Bethlehem in its answer to the complaint, Paragraph 6, stated:

> "Defendant states that the plaintiffs have a remedy at law in that plaintiffs may file a complaint before the President's Committee on Equal Employment Opportunity established pursuant to the Executive Order upon which the plaintiffs rely. Section 60-1.21 of the rules and regulations adopted by the President's Committee reads as follows:
>
> " 'Who may file complaints.—Any employee of any contractor or subcontractor or applicant for employment with such contractor or subcontractor who believes himself to be aggrieved under the equal opportunity clause may, by himself or by an authorized representative, file in writing a complaint of alleged discrimination. Such complaint must be filed not later than 90 days from the date of the alleged discrimination, unless the time for filing is extended by the agency or the Executive Vice Chairman upon good cause shown.'
>
> "Plaintiffs may also file a complaint under the Fair Employment Practices Act of the State of Illinois and may obtain judicial enforcement of any order of the Commission established by that Act."

Plaintiffs admitted on cross-examination that they had not exhausted their administrative remedies either before the President's Committee or before the Illinois Commission on Fair Employment Practices. (Tr. 518, 549, 564.) Exhaustion of administrative remedies is required before plaintiffs may seek the aid of a federal District Court on account of alleged violations of the Executive Orders with respect to race discrimination. *Farmer* v. *Philadelphia Electric Company*, 215 F. Supp. 729, U. S. D. Ct., E. D. Pa., 32 L. W. 1141, 2464 (March 12, 1964). In this case the Court of Appeals stated:

"We believe that the doctrine of 'exhaustion of administrative remedies' should at least be applied here, and that plaintiff be required to file a complaint with an appropriate contracting agency or with the President's Committee before being permitted to seek the aid of a Federal district court. However, whether a district court could then entertain jurisdiction is not here decided."

CONCLUSION.

The petition should be denied. The issues as formed by the complaint are moot. This case should be remanded to the District Court, the judgment and decree of that Court should be vacated and that Court should be directed to dismiss the complaint against Bethlehem as moot

Respectfully submitted,

PAUL R. CONAGHAN,
Attorney for Bethlehem Steel Company, Respondent.

STEVENSON, CONAGHAN, HACKBERT,
ROOKS and PITTS,
Of Counsel.

APPENDIX.

IN THE UNITED STATES DISTRICT COURT.

For the Northern District of Illinois,

Eastern Division.

Ronald L. Todd and Michael Cochran by his parents and next friends, Ulysses Cochran and Patricia Cochran, and James Hill, *Plaintiffs*,

vs.

Joint Apprenticeship Committee of the Steel Workers of Chicago and International Association of Bridge, Structural and Ornamental Iron Workers Local Union No. 1, Sidney I. Cole, Chairman, Frank D. Reiland, Treasurer, A. Walter Becker, Thomas Cannon, James Eads, Joseph Frankovic, Stanford Jacobs, and Edmund D. Flood, Apprentice Co-Ordinator, Iron Workers Bridge and Structural Union, Local No. 1, Steve Zakula, President, Frank Pauley, Secretary-Treasurer, Joseph Frankovic, Job Representative, and Edmund D. Flood, Apprentice Co-Ordinator, Iron Workers District Council of Chicago & Vicinity, Leslie L. Myers, President, Robert Benson, Secretary and William Knapp, Vice-President; Paschen Contractors, Inc., a Delaware corporation; Peter Kiewit Sons' Co., a Nebraska corporation; Bethlehem Steel Company, a Delaware corporation; and Dominic Tesauro, Regional Administrator, General Services Administration, *Defendants*.

No. 63-C-1739

COMPLAINT.

Now come Ronald L. Todd and Michael Cochran, by his parents and next friends, Ulysses Cochran and Patricia

Cochran, and James Hill, all residents and citizens of the State of Illinois and of the United States of America by William R. Ming, Jr., and George N. Leighton, their attorneys, complaining of Joint Apprenticeship Committee of the Steel Workers of Chicago and International Association of Bridge, Structural and Ornamental Iron Workers Local Union No. 1, Sidney I. Cole, Chairman, Frank D. Reiland, Treasurer, A. Walter Becker, Thomas Cannon, James Eads, Joseph Frankovic, Stanford Jacobs, Edmund D. Flood, Apprentice Co-Ordinator; Iron Workers Bridge and Structural Union, Local No. 1, Steve Zakula, President, Frank Pauley, Secretary-Treasurer, Joseph Frankovic, Job Representative, and Edmund D. Flood, Apprentice Co-Ordinator; and Iron Workers District Council of Chicago & Vicinity, Leslie L. Myers, President, Robert Benson, Secretary and William Knapp, Vice-President, all of which organizations and individuals are sometimes collectively referred to hereinafter as the Union; Paschen Contractors, Inc., a Delaware corporation, and Peter Kiewit Sons' Co., a Nebraska corporation, hereinafter referred to as Contractors; Bethlehem Steel Company, a Delaware corporation, hereinafter referred to as Sub-Contractor; and Dominic Tesauro, Regional Administrator of the General Services Administration, hereinafter referred to as Administrator, hereby invoke the jurisdiction of this Court under the provisions of Title 28 U. S. C., Section 1331, in that the matter in controversy arises under the constitution and laws of the United States and the amount in controversy is in excess of $10,000.00. For cause of action plaintiffs allege:

1. On or about October 26, 1962, by Contract No. GS 5PC-1178 Contractors undertook and agreed to construct a United States Courthouse and Federal Office Building in Chicago, Illinois. One of the provisions of that contract was as follows:

"In connection with the performance of work under this contract, the Contractor agrees as follows:

(a) The Contractor will not discriminate against any employee or applicant for employment because of race, creed, color or national origin. The Contractor will take affirmative action to ensure that applicants are employed, and that employees are treated during employment without regard to their race, creed, color, or national origin. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post in conspicuous places, available to employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of this Nondiscrimination clause.

(b) The Contractor will, in all solicitations or advertisements for employees placed by or on behalf of the Contractor, state that all qualified applicants will receive consideration for employment without regard to race, creed, color, or national origin.

(c) The Contractor will send to each labor union or representative of workers with which he has a collective-bargaining agreement or other contract or understanding, a notice, to be provided by the agency Contracting Officer, advising the said labor union or workers' representative of the Contractor's commitments under this Nondiscrimination clause, and shall post copies of the notice in conspicuous places available to the employees and applicants for employment.

(d) The Contractor will comply with all provisions of Executive Order No. 10925 of March 6, 1961, and of the rules, regulations, and relevant orders of the President's Committee on Equal Employment Opportunity created thereby.

(e) The Contractor will furnish all information and reports required by Executive Order No. 10925 of March 6, 1961, and by the rules, regulations, and orders of the said Committee, or pursuant thereto, and will

permit access to his books, records, and accounts by the contracting agency and the Committee for purposes of investigation to ascertain compliance with such rules, regulations, and orders.

(f) In the event of the Contractor's noncompliance with the Nondiscrimination clause of this contract or with any of the said rules, regulations, or orders, this contract may be canceled in whole or in part and the Contractor may be declared ineligible for further Government contracts in accordance with procedure authorized in Executive Order No. 10925 of March 6, 1961, and such other sanctions may be imposed and remedies invoked as provided in the said Executive order or by rule, regulations, or order of the President's Committee on Equal Employment Opportunity, or as otherwise provided by law.

(g) The Contractor will include the provisions of the foregoing paragraphs (a) through (f) in every subcontract or purchase order unless exempted by rules, regulations, or orders of the President's Committee on Equal Employment Opportunity issued pursuant to section 303 of Executive Order No. 10925 of March 6, 1961, so that such provisions will be binding upon each subcontractor or vendor. The Contractor will take such action with respect to any subcontract or purchase order as the contracting agency may direct as a means of enforcing such provisions, including sanctions for noncompliance: *Provided, however,* that in the event the Contractor becomes involved in, or is threatened with, litigation with a subcontractor or vendor as a result of such direction by the contracting agency, the Contractor may request the United States to enter into such litigation to protect the interests of the United States."

Another provision was as follows:

"Apprentices will be permitted to work only under a bona fide apprenticeship program registered with a State Apprenticeship Council which is recognized by the Federal Committee on Apprenticeship, U. S. Department of Labor; or if no such recognized Council

exists in a State, under a program registered with the Bureau of Apprenticeship, U. S. Department of Labor."

At all times material herein there was in full force and effect in the State of Illinois, a bona fide apprenticeship program for iron workers which had been approved by the United States Department of Labor on September 30, 1952.

2. Under the provisions of the said iron workers apprenticeship program the only requirements for apprentices are:

"A. Applicants for apprenticeship shall not be less than eighteen (18) years of age nor more than thirty (30) years of age, have a pronounced aptitude and interest in this craft and be physically able to perform the required work.

B. They shall be American citizens or make declarations to become same, or Canadian citizens within the Dominion of Canada.

C. They shall provide proof of their age.

D. They shall keep such records of their apprenticeship training as may be required by the Committee."

3. Plaintiffs Ronald L. Todd, Michael Cochran and James Hill are twenty-three (23), twenty (20) and twenty-one (21) years of age respectively, and having been born in the United States, plaintiffs are citizens of the United States. They belong to the ethnic group commonly designated as Negroes. Plaintiffs and each of the persons who constitute the class to which plaintiffs belong have a pronounced aptitude and interest in the iron workers craft and are physically able to perform the required work. Each plaintiff provided proof of his age to the Iron Workers' Joint Apprenticeship Committee on or about the 12th day of June, 1963, and has demonstrated that he satisfies the minimum standards of education and experience for apprenticeship under the said apprentice program. Said Committee refused to certify plaintiffs as apprentices solely

because of their race and color. Plaintiffs and each of the persons of the class to which plaintiffs belong are persons who are either without financial means or of limited financial ability to bear the necessary costs and expenses of these proceedings. Defendants, on the other hand, are corporations, associations and individuals, who own and control vast sums of resources and assets.

4. In April 1963 plaintiffs and each of them sought employment by the Sub-Contractor as an apprentice iron worker. Notwithstanding the application and qualifications of plaintiffs and each of the persons similarly situated, Bethlehem Steel Company has failed and refused to employ these persons or any of them to work on the project covered by Contract No. GS-5PC-1178 solely because of their race and color. For the same reason the Sub-Contractor has refused to employ any person as a structural iron worker who is a Negro. Moreover, though Contractors well-know all of the facts alleged herein to be true, Contractors have failed and refused to take action, affirmative or otherwise to cause employment of plaintiffs.

5. The provisions of the contract quoted hereinabove were entered into for the benefit of plaintiffs and persons similarly situated. Plaintiffs are members of a class of persons who, being residents and citizens of the United States, commonly designated as Negroes, are and have been for many years objects and victims of discrimination in employment and exclusion from certain classes and crafts of employment of which the craft of structural iron workers is one. The size of this class is so great and the number of persons so numerous that it would not be practicable for all such persons to join in this action. Plaintiffs therefore bring this action on their own individual behalf and on behalf of that class.

6. All of the defendants herein well know the truth of the allegations contained herein. Notwithstanding the aforesaid, none of the defendants has secured enforcement of the rights of the plaintiffs or the class they represent under the terms of Contract No. GS-5PC-1178. The plaintiffs have no remedy at law which would be adequate.

7. On or about the 6th day of March, 1961, the President of the United States issued Executive Order No. 10925, which provides, in part:

> "Whereas discrimination because of race, creed, color, or national origin is contrary to the Constitutional principles and policies of the United States; and
>
> Whereas it is the plain and positive obligation of the United States Government to promote and ensure equal opportunity for all qualified persons, without regard to race, creed, color, or national origin, employed or seeking employment with the Federal Government and on government contracts; and
>
> Whereas it is the policy of the executive branch of the Government to encourage by positive measures equal opportunity for all qualified persons within the Government; and
>
> Whereas it is in the general interest and welfare of the United States to promote its economy, security, and national defense through the most efficient and effective utilization of all available manpower; . . ."

Wherefore, the plaintiffs respectfully pray this Court to enjoin the defendants and each of them from proceeding with the performance of Contract No. GS-5PC-1178 unless and until plaintiffs and each of them is duly and regularly employed as an iron workers apprentice or in the alternative that this Court enjoin and restrain the defendants and each of them from making or receiving any payments on

account of such contract unless and until plaintiffs and each of them is duly and regularly employed as an iron workers apprentice.

Ronald L. Todd and Michael Cochran, by his parents and next friends, Ulysses Cochran and Patricia Cochran, and James Hill,

Plaintiffs.

By .....

William R. Ming, Jr.,
George N. Leighton,
Of Counsel.